JD(SF)-15-05
Salinas, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

BUD ANTLE, INC.

and **Cases 32-CA-21181**
32-CA-21596

FRESH FRUIT AND VEGETABLE WORKERS LOCAL 1096, UNITED FRUIT & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

Michelle M. Smith, Esq., of Oakland, CA, appearing on behalf of the General Counsel
William D. Claster, Esq., for Gibson, Dunn & Crutcher, LLP, of Irvine, CA, appearing on behalf of the Respondent
David A. Rosenfeld, Esq., for Weinberg, Roger & Rosenfeld, of Oakland, CA, appearing on behalf of the Charging Party

DECISION

BURTON LITVACK: ADMINISTRATIVE LAW JUDGE

Statement of the Case

United Fruit & Vegetable Workers Local 1096, United Food & Commercial Workers International Union, AFL-CIO, herein called the Union, filed the unfair labor practice charge in Case 32-CA-21181 on January 29, 2004. After an investigation, on June 18, 2004,[1] the Regional Director of Region 32 of the National Labor Relations Board, herein called the Board, issued a complaint, alleging that Bud Antle, Inc., herein called Respondent, engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act, herein called the Act. Thereafter, Respondent filed a timely answer, essentially denying the commission of the alleged unfair labor practices. Pursuant to a notice of hearing, the unfair labor practice allegations came to trial before the above-named administrative law judge in Oakland, California on September 9. At the trial, all parties were afforded the opportunity to present, to examine, and to cross-examine witnesses; to offer into evidence any relevant documentary evidence, to argue their legal positions orally, and to file post-hearing briefs. Such briefs were filed by counsel for the General Counsel, by counsel for Respondent, and by counsel for the Union. The Union filed the unfair labor practice charge in Case 32-CA-21596 on August 27, 2004, and, after an investigation, on October 25, the Regional Director of Region 32 of the Board issued a complaint, alleging that Respondent had engaged in, and continues to engage in, unfair labor practices within the meaning of Section

[1] Unless otherwise stated, all events herein occurred during 2004.

8(a)(1) and (3) of the Act. Thereafter, and pursuant to a motion filed by the General Counsel, on November 1, the above-named administrative law judge issued an order, consolidating the above-captioned unfair labor practice cases. Respondent filed an answer, essentially denying the commission of the alleged unfair labor practices. On December 7, counsel for the General Counsel, counsel for Respondent, and counsel for the Union filed a joint motion to approve a stipulated record and a stipulation of facts, and, on December 8, the above-named administrative law judge approved said motion. Subsequently, counsel for the General Counsel and counsel for Respondent filed briefs. Accordingly, based upon the entire record in the consolidated matters, including the parties' briefs and my observation the demeanor of the witness,[2] who testified during the hearing in Case 32-CA-21181, I issue the following:

FINDING OF FACTS

1. Jurisdiction

At all times material herein, Respondent, a State of California corporation with its principal office and place of business in Salinas, California, has been engaged in the business of the processing and non-retail distribution of lettuce and other vegetables. In connection with its business operations, during the 12-month period preceding the issuance of the complaint in Case 32-CA-21181, Respondent, in the course and conduct of its business operations, purchased and received goods valued in excess of $50,000 directly from suppliers located outside the State of California.

II. Labor Organization

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Issues

Concerning the allegations of the complaint in Case 32-CA-21181, the parties stipulated that, on December 19, 2003, Respondent offered approximately 130 locked-out employees reinstatement to their former positions of employment. As to the alleged unfair labor practices, the issue involves whether Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act by failing and refusing to immediately reinstate 24 of said individuals, who had accepted Respondent's offers. The corollary issue, posed by Respondent's defense, is whether the latter possessed legitimate and substantial business justification for delaying the reinstatement of the 24 individuals until February 23, 2004. There is no dispute that only eight former locked-out employees reported for work on February 23, and the parties stipulated that the issue, raised by the allegations of the complaint in Case 32-CA-21596, concerns whether Respondent violated Section 8(a)(1) and (3) of the Act by limiting the overtime worked by seven of said employees during the four weeks after they returned to work on February 23.

IV. The Alleged Unfair Labor Practices

A. <u>The Facts</u>

Respondent, a California corporation and a wholly-owned subsidiary of Dole Fresh

[2] Most of the facts herein are taken from stipulations of the parties.

Vegetables, is engaged in the business of the processing and the non-retail distribution of lettuce and other salad products and vegetables, and, in this regard, operates refrigerated warehouses, termed "coolers," where the above products which, having been trucked from the field, are cooled down to a low temperature and stored for short periods of time while awaiting shipment to distribution centers. Currently, Respondent maintains three coolers in Yuma, Arizona, Marina, California (located near Salinas), and Huron, California (located near Fresno).[3] The record establishes that, given the times of the growing seasons in the surrounding areas, Respondent's business operations are seasonal in nature with the Marina cooler being in "full operation" from the end of March until the end of November of each year, the Yuma cooler being in full production between the end of November and the end of March each year, and the Huron facility, in which the sole product stored is lettuce, being in operation during two growing seasons from March 15 through April 15 and from October 15 through November 15 each year. While in full production, Respondent normally employs approximately 100 employees at the Marina cooler, approximately 90 employees at the Yuma cooler, and 35 employees[4] at the Huron facility. The record further establishes that, at its Yuma and Marina facilities, Respondent employs a fairly stable workforce with employees moving between each as the growing seasons commence and conclude and that, as a growing season in an area begins to wind down, the necessary employee complement at Respondent's area cooler concomitantly decreases so that, at the end of a season, no more than eight to ten employees and one supervisor remain working. Dave Davis, who was the only witness at the hearing, is the director of cooler operations for Dole Fresh Vegetables, and Terry Chappell is plant manager of the Yuma cooler.

The parties stipulated that, since about 1976, Respondent and the Union have had a collective bargaining relationship with the Union acting as the bargaining representative of Respondent's full-time and regular part-time seasonal and year-round cooler, dock, warehouse, cold room, and loading employees at its Marina, Yuma, and Huron facilities and that the parties had successive collective-bargaining agreements with the last of said agreements having expired in 1989. The parties commenced negotiating for a successor agreement in June 1989; however, with negotiations unsuccessful, the bargaining unit employees commenced an economic strike in August. Respondent immediately hired temporary replacements, and, in November 1989, it locked out its aforementioned employees. That month, the Union, on behalf of the striking employees, made an unconditional offer to return to work; however, in response, Respondent advised the Union that the lockout would continue in effect until a successor contract was signed. The lockout continued for 14 years, and, in 2003, Teamsters Local 890, herein called the Teamsters, began an organizing campaign amongst Respondent's replacement employees. On August 6, 2003, the Teamsters filed a petition in Case 32-RC-5174 to represent said employees, and a representation hearing was held in that matter on August 19. On that same date, Respondent, the Union, and the Teamsters entered into a stipulated election agreement[5] and an accompanying letter of agreement. The latter document reads as follows:

---

[3] In 1989, when the lockout at issue herein occurred, in addition to the facilities in Marina and Huron, Respondent operated coolers located in Guadalupe, Calipatria, and Poston, Arizona. The Yuma facility was opened in 1990 or 1991.

[4] Apparently, only a "few" employees will go form Marina to Huron and, then, to Yuma and from Yuma to Huron and, then, to Marina each year.

[5] The voting unit consisted of all "current and locked-out full-time and regular part-time seasonal and year-round cooler, dock, warehouse, cold room and loading employees employed by Respondent."

> This letter confirms the following agreement between [the Union and Respondent.
>
> (1) Following certification of the results of the election . . . the Company will offer reinstatement to those employees who were locked out as of 1989….
>
> (2) The offers of reinstatement, which will be open for 30 days, shall include the opportunity to return to work at the current terms and conditions of employment and retention of seniority (defined as actual years of service as of the date of the lockout). Such seniority will be honored for all purposes, as will the seniority accumulated by the replacement workers since the commencement of the lockout.

As scheduled, an NLRB representation election was conducted at each of Respondent's three facilities during September, November, and December 2003, and, on December 3, a tally of ballots was issued, showing that, of approximately 280 eligible voters,[6] 80 votes were cast in favor of the Teamsters, 7 votes were cast in favor of the Union, and 146 ballots were cast against representation by either labor organization. Subsequently, on December 15, the Regional Director of Region 32 issued a certification of results of election, stating that a majority of the valid votes were not cast for either labor organization and that no labor organization was the exclusive representative of Respondent's employees in the bargaining unit, which had been formerly represented by the Union.

On or about December 19, 2003, Respondent sent identical letters, offering reinstatement to each of approximately 130 locked-out employees. Said letters read as follows:

> We are pleased to inform you that the Company is formally ending the lockout of its cooler employees. This decision follows the NLRB's certification of election results issued on December 15, 2003.
>
> In accordance with this decision, we hereby offer you reinstatement to your former position of employment with Bud Antle. If you are reinstated, you will return to work under the Company's current terms and conditions of employment. In addition, your pre lockout seniority will be used for all purposes.
>
> If you are interested in reinstatement, you must notify the Company by returning the enclosed form with the requested information by January 22, 2004. Please bear in mind that the date of reinstatement and the job to which you will be reinstated will depend on (1) the number of locked-out employees seeking reinstatement, (2) your seniority relative to other employees, including both locked-out and replacement employees, and (3) your being qualified to perform the job to which you are recalled.

Thereafter, and continuing through January 22, 2004, Respondent received hand-delivered and mailed letters, requesting reinstatement, from 24 locked-out employees. Their names and the dates, on which Respondent received said letters, are listed below:

---

[6] Respondent's Exhibits 1 and 2 establish that, as of the date of the election, there were 133 locked-out employees and 127 replacement workers.

John C. Rodriguez	December 22, 2003
Charles Collenback	December 23, 2003
Ray Valasquez	December 26, 2003
Danny Gutierrez	December 28, 2003
Alvin Anderson	December 29, 2003
John Todd	December 29, 2003
Rod Kenneth Penney	December 29, 2003
Matt Forstedt	December 30, 2003
Cheryl Vaz	December 30, 2003
Robert D. Tully	December 31, 2003
Jerry McBride	January 2, 2004
Loretta Heinz	January 7, 2004
Alejandro Rivas	January 7, 2004
Rigoberto Lopez	January 8, 2004
Eugene Navavoli	January 12, 2004
Salvatore Escobar	January 14, 2004
Gary E. Jackson	January 15, 2004
Thomas O. Norris	January 15, 2004
Joe Flores Olvera	January 15, 2004
Louie Pestoni	January 16, 2004
Michael Kemp	January 17, 2004
Russ Christiansen	January 19, 2004
Larry Joe Azlin	January 22, 2004
Mel Southworth	January 22, 2004

On January 28, Respondent sent identical letters to each of the above-named 24 employees. Said letters read as follows:

> This letter confirms receipt of your acceptance of our offer of reinstatement to your employment at Bud Antle, Inc.. Set forth below are the details of your returning to work.
>
> We have established Monday, February 23, 2004 as the return to work date for all locked-out employees. Because of the amount of time that has elapsed since you last worked for the Company, all returning employees, regardless of seniority, will be required to spend the first 20 days of their re-employment at the Company's Yuma, Arizona cooler where they will undergo orientation and training. After this initial period, you may be reassigned to another facility depending on your seniority. For your information, we have enclosed the seniority guidelines, which include the Company's policy on traveling to different facilities at the end of each season. Please note that this 20-day orientation and training period is mandatory— any employee who fails to attend is subject to termination for job abandonment.
>
> All locked-out employees will be entitled to travel pay to Yuma, weekly per diem of $225 pursuant to the Company's 2003-04 per diem policy, and pay and benefits according to the attached exhibits….
>
> We look forward to seeing you at the Yuma Cooler . . . on February 23.

Dave Davis testified that, while the lockout continued for 14 years during which time Respondent continued to operate its coolers with replacement employees, all locked-out employees were permitted to vote in the election; that, at the time Respondent mailed the

December 19, 2003 letters to the said individuals, its Yuma cooler was in full operation[7] with "about 90" employees working there;[8] and that Respondent was expecting a "relatively high" rate of acceptances. In this regard, when asked why the December 19 letter set forth conditions for reinstatement, Davis, who was involved in the decision-making process, replied, "Basically, because if everybody came back, we wouldn't have enough jobs for everybody."[9] Based upon this uncertainty, according to Davis, Respondent's intent when the January 22, 2004 deadline for reinstatement acceptances arrived was "to determine how many workers we had in total between both the locked-out people and the current employees. And put the seniority list together accordingly. And figure out where everybody stood."[10] As to why Respondent failed to reinstate each locked-out employee upon receipt of his or her request for reinstatement, Davis reiterated that ". . . until the 22nd or the 23rd when we had them all, we didn't know how many people we were going to have." He added that Respondent was also concerned about the lack of "efficiency" in reinstating employees on a piecemeal basis--"I didn't . . . think it would be very efficient in the business to bring back two guys and train them today and three more guys tomorrow and train them. It was more efficient to do it one time."[11] Further, Davis

---

[7] Davis testified that, during the prior season at Marina, Respondent hired new hires on different days with each placed on "the same 20 days probation period" as the reinstated locked-out employees. He admitted that the training given to each was similar to that given to the returning locked-out employees and was done on an individual basis for any hired alone. According to Davis, training is on an individual basis "if we hire just one, yeah."

[8] During cross-examination, Davis estimated that, each season, there are between five and ten new hires employed at the Yuma cooler. According to him, the number of new hires and whether or not they are hired as a group or on a piecemeal basis are solely products of necessity.

[9] Inasmuch as, given the total number of ballots cast in the election, a significant number of locked-out employees, probably in excess of 100, must have voted, this apparently was not an unreasonable concern. However, during cross-examination, Davis acknowledged being aware that several locked-out employees had left California or were either dead or disabled. Moreover, during the representation case hearing, a company official, Danny Urbano, the head of labor relations, testified that ". . . some people are no longer around . . . " and that a union official told him "less than 30, around 30" individuals would return.

[10] While, during cross-examination, Davis denied that Respondent would have been able to put each of the 24 locked-out employees back to work in his former job immediately after acceptance of Respondent's offer ". . . because . . . there might have been some classifications where by their seniority, they wouldn't have had a position," analysis of Respondent's Exhibits Nos. 2 and 3 discloses that all of the 24 locked-out employees had greater seniority than at least one replacement worker in their respective job classifications. Moreover, several, including Azlin, Christiansen, Escobar, Forstedt, Jackson, Lopez, Navavoli, Norris, Olvera, Penny, Southworth, Tully, and Valasquez, had in excess of 13 years seniority. Specifically, during cross-examination, Davis admitted that John Rodriguez, a forklift operator, who had in excess of six years of seniority prior to the lockout, had more seniority than some replacement forklift operators and would have had the right to bump if immediately reinstated. Likewise, Davis conceded that Respondent could have immediately reinstated locked-out employees Robert Tully and Danny Gutierrez to their former positions.

[11] However, during cross-examination, asked if, for training purposes, there would have been any practical problem for training locked-out people if reinstated on the day of acceptance of the offer to return, Davis replied, "We could have," but "I would have preferred to do it in some

Continued

believed that language of the parties' "stipulation," which held Respondent's offer open for 30 days, permitted it to delay reinstatement of any locked-out employee, who responded to Respondent's offer, for 30 days. With regard to why, after January 22, Respondent failed to immediately reinstate the 24 locked-out individuals, who had requested reinstatement, Davis testified that, shortly after that day, he met with Respondent's human resources personnel, "and we talked about things such as where the reinstatement should be because we were currently operating mostly in Yuma . . . were going to give them travel pay . . . per diem. And . . . what date the training should be . . . . because the business has changed quite a bit in 14 years." As a result of their discussion, according to Davis, Respondent mailed its January 28 letter to each of the above 24 employees.

Monday, February 23, 2004 was the date Respondent selected as the reinstatement date for the 24 returning locked-out employees, and Davis advanced several reasons for its choice of that day. First, Respondent wanted the employees to begin working "on a Monday" as "our pay period starts on Sunday." As to this, Davis explained, Respondent decided against the following Monday, February 2 as the reporting date; for the employees would receive its letter on Thursday or Friday, "and it seemed unreasonable to have them show up on the 2nd, which was two days later." February 9 and 16 were considered, but, as to the former, ". . . we felt that we needed to give people . . . a reasonable amount of time to . . . give their current employ[ers] notice," the "standard" two-weeks notice.[12] As to February 16, according to Davis, "there were two issues with that week. One is our plant manager was on vacation that week," and "[Chappell, who was the only current supervisor who was also a manager in 1989 and who would be involved with the training,] was the one that knew exactly what the skill level of the 24 people was and what needed to be done to get them from that level to the current requirements." The other issue was the two-weeks notice, which the returning locked-out employees presumably would give to their employers--". . . if some of the people are from out-of-state . . . it seemed maybe unreasonable for them to work at their job on Friday and be in Yuma Sunday night to start on Monday." Specifically regarding Chappell, Davis testified that the training, which was to be conducted by the plant manager, was to last 20 days and had two aspects. The first was the "usual . . . HR stuff," such as benefits and policies. The other involved the so-called "current requirements" of the work, the "actual job skills that were required," many of which had changed since the lockout was instituted in 1989. According to Davis, Respondent's products now are commodities, such as lettuce heads, celery, and cauliflower, and value-added products, which are bagged salads and which did not exist in 1989. Also, the job has become more technologically advanced. In 1989, loaders worked from printed manifests and merely were instructed to load a given amount of product on to a truck "generally" on a first in-first out basis;[13] while, currently, ". . . all of our product has a bar code

_____

kind of groups."

[12] Asked if he ever inquired as to whether any of the 24 individuals actually needed to give two-weeks notice to a current employer, Davis admitted that he had no personal knowledge but based his decision-making on what he heard from another individual, Vera Martinez. She reported that locked-out employee, Danny Gutierrez, had called to say he wanted to give two-weeks notice in order not to leave his job "on a bad note," and locked-out employee, Larry Joe Azlin, was then living in Oklahoma and required time to move his "stuff" to Yuma. Of course, the foregoing was uncorroborated hearsay, and Respondent's counsel assured the undersigned Davis' testimony was not being offered for its truth.

[13] Bagged salads, in the vernacular of the industry-- salad mix, are not shipped on a first in-first out basis. Rather, for this, Respondent must ship "today's product" to customers in New York but can ship "three-day-old product" to customers in Los Angeles. Thus, in contrast to

Continued

on a pallet. In that bar code is all the information about the history of that pallet. So we know what day it came [in], what crew it came from, what item it is, how many units are on the pallet." To read the bar codes, employees utilize "hand-held scanners." A dispatcher types in an order number, which appears on the screen of a scanner, and a loader must scan the bar code on a pallet to ensure he has pulled the correct order.[14] Davis added that the importance of Chappell's presence was that he alone knew what the employees' skills were prior to the lockout and what skills each required to learn in order to do his job in 2004.

There is no dispute that, on February 23, 2004, only eight (Charles Collenback,[15] Danny Gutierrez, Gary E. Jackson, Rigoberto Lopez, Rod Kenneth Penny, Alejandro Rivas, John C. Rodriguez, and Robert D.Tully) of the 24 locked-out individuals, who had requested reinstatement, reported for work.[16] Davis stated that Respondent never again heard from the other 16 locked-out employees and that they were ". . . terminated for job abandonment after two days."[17] The record reveals that, on their first day of work, the returning locked-out employees filled out forms, including the I-9, the W-4, and benefit enrollment documents, received orientation training on house rules and company policies, underwent drug screens, and attended a safety training session.[18] Subsequent training for the returning employees included receipt of a manual, on use of the company scanners, for each to read, an "interactive" class,

_____

lettuce heads or celery, cooler workers must be aware of the product age and shipping location for Respondent's bagged salads.

[14] This is significant inasmuch as Respondent often ships pallets, which contain a combination of product, to customers, and it is important that the correct product mix is in a pallet.

[15] According to Davis, Collenback appeared on February 23, claimed he had not been working because of a workers compensation claim, and failed to report for work thereafter.

[16] The parties stipulated that, as of this date, Respondent did not have any specific knowledge about what work the seven returning locked-out employees had performed over the previous 14 years, whether they continued to have the physical skills and abilities to perform the work at Respondent's facilities, or whether they would have any difficulties learning the new systems and methods utilized at the coolers since the lock-out commenced in 1989. Thus, with regard to returning locked-out employee Rodriguez, Davis admitted that "I had no idea what he'd been doing during the last 14 years," and "I had no idea what his skills were like."

[17] Davis testified that, even if all 24 locked-out employees had reported on February 23, "we would not have laid anybody off until the end of the season." He added that, at that time, ". . . if we had too many people . . . the lowest seniority people would not have been transferred. They would nave just been laid off at the season."

[18] According to Davis, the plant manager customarily performs this training; however, if Chappell was unavailable, it was done by "one of the other managers." Asked why such was not done on this occasion, Davis opined, "I guess it could have." In fact, when asked if Chappell did the safety training for the returning locked-out employees, Davis said, "There were probably two or three supervisors and Terry that were in the room together," and he did not know who actually concocted the safety session. In this regard, General Counsel's Exhibit No. 2, the safety tailgate meeting report, shows the instructor as being Jim Kesinger, and General Counsel's Exhibits 3(a) through (h), the reports accounting for the forms and documents given to the returning employees, were executed by either Rosie Keeton or Vera Martinez. Finally, Davis stated, during cross-examination that Chappell would have been available for training on most days in the last three weeks of January 2004.

regarding use of the scanners, with Chappell, and some "specialized" training on skills, which were different than in 1989, with supervisors or senior employees. During cross-examination, asked if there was anything different as to the treatment of the reinstated employees compared with that given to new hires, Davis said, "no." He added, and the parties stipulated, that this identical treatment included the 20 day training/probation period, which always begins with "an official-type" training program, a drug screen, and, thereafter, on-the-job training sessions with supervisors and/or senior employees.

The parties stipulated that, when new employees are hired by Respondent, their initial four weeks are considered a training period. During this period of time, Respondent limits the assignment of overtime to these ployees inasmuch as it wants this work, which involves higher pay, to be done as quickly and efficiently as possible and as the new hires generally are not as adept as existing employees at performing their work assignments in the required manner. After employees have worked their initial four weeks, overtime is distributed evenly among all employees without regard to seniority. The parties further stipulated that Respondent treated the seven returning locked-out employees as if they were new employees for purposes of overtime assignments during their initial four weeks back at work and that its reasons for doing so were (1) its lack of specific information as to what work the seven employees had performed during the previous 14 years, whether the seven continued to possess the physical skills and abilities to perform the work at Respondent's coolers, and whether the said employees would experience difficulty in learning the new systems and methods now utilized at Respondent's coolers and (2) its belief that the seven employees would require the training period to enable themselves to perform their work assignments quickly and efficiently. In particular, based upon its experiences with other employees, Respondent believed that the seven returning locked-out employees would need the entire four-week training period to become fully proficient in using the scanners to load and consolidate pallets and to learn how to determine the appropriate age (based upon when the product was harvested and produced and customers' requirements) of the products to be loaded, the location of the products in the cooler, and the various codes for Respondent's products. Further, the parties stipulated that, after the four-week training period, the seven returning locked-out employees were given the same overtime opportunities as existing employees.

The parties also stipulated that, of the seven returning locked-out employees, Tully and Penny returned as loaders, Gutierrez returned as a picker, Rodriguez and Lopez returned as inside forklift drivers, Jackson returned as an outside forklift driver, and Rivas returned as a dispatcher[19] and that Respondent failed to expend any effort to ascertain the job experiences, skills, education, or job-related training maintained or acquired by any of the above seven employees during the time period August 1989 through February 23, 2004.[20] For example, Respondent did not know that, prior to returning to work with Respondent, returning locked-out employee Rivas had been working as a dispatcher for many years at Skyview Produce, a Yuma-based company which also runs Dole product, and that, as a dispatcher for Skyview Produce, Rivas utilized the same hand-held scanners used by Respondent and otherwise performed work similar to that which he performed for Respondent upon his return for work on February 23.[21] Also, the parties stipulated that not all employees use the hand-held scanners

[19] A foreman is always present when employees, new or veteran, work, including overtime.

[20] Respondent has no documents showing the job experience, skills, or job-related training acquired by any of the returning locked-out employees during the period of the lockout.

[21] One difference in the work was that Skyview Produce handled only raw commodities;

Continued

or computers. For example, returning locked-out employee Rodriguez did not use a hand-held scanner in the performance of his duties as an inside forklift driver. In addition, returning locked-out employees Jackson, Lopez, Penny, Rodriguez, and Tully did not need any training on the mechanical operation of a forklift or the mechanics of loading and unloading product, and they were all operating forklifts for Respondent by February 24. In addition, none of the seven of the former locked-out employees had to learn the location of product in the cooler, product codes, or dating requirements for Respondent's product, and other employees and foremen were available to answer any of their questions.[22]

The parties next stipulated that, prior to the commencement of the lockout in 1989 by Respondent, returning locked-out employees Gutierrez, Jackson, Lopez, Penny, Rivas, Rodriguez, and Tully each had acquired the same overtime privileges as other employees, that they were not probationary employees, that Respondent did not limit their overtime assignments, and that, during the four-week period commencing on February 23, 2004, while treating each of the seven returning locked-out employees as a new employee and limiting his overtime hours, each of the seven employees worked some overtime.[23] The parties further stipulated that, in connection with the assignment of overtime, Respondent does not possess any documents showing its policy or practice, regarding the assignment of overtime to new employees, to employees returning to work after any kind of absence, or to existing, non-probationary employees, in effect during the period January 1 through March 31, 2004.

B. Legal Analysis

The parties agree, and I concur, that the issues presented herein, involving the alleged right of former locked-out full-time employees to immediate reinstatement upon the acceptance, by each, of his employer's offer of reinstatement and their alleged right, upon reinstatement, to be treated, by their employer, in the same manner as existing full-time employees, for the purpose of receiving overtime assignments, are matters of first impression. There is also no dispute that, as to whether Respondent's failure to immediately reinstate the 24 locked-out employees, who accepted its offer to return to work, and its treatment of the seven locked-out employees, who returned to work, as new employees for the purpose of assigning overtime work were, as alleged, violative of Section 8(a)(1) and (3) of the Act, the proper analytical approach is that which has been articulated by the Supreme Court. Thus, the Court holds that ". . . there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required," and ". . . that the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve

---

whereas Respondent also handles bagged salad product. Raw commodities are dated and require rotation in order to assure that the first product in from the field is the first product out. Moreover, the dating system used to manage the distribution of bagged salad products is more complicated, and Rivas needed to learn the more complicated dating requirements for Respondent's products.

[22] Respondent failed to document the progress, work performance, or any limitations of the job performance of either Danny Gutierrez, Gary Jackson, Rigoberto Lopez, Rod Kenneth Penny, Alejandro Rivas, John C. Rodriguez, or Robert Tully during the four weeks after each returned to work on February 23, 2004.

[23] Respondent's payroll records, Joint Exhibit 9(a) through (kk), disclose that each of the seven employees worked overtime on multiple Saturdays during the four-week period commencing on February 23.

the employer's protestations of innocent purpose." American Ship Building Co. v . NLRB, 380 U.S. 300, 311-12 (1965). Further, the Court directs that, if an employer's conduct is within this category of misconduct,[24] "the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations," no proof of antiunion motive is needed," and the Board must ". . . strike the proper balance between the asserted business justifications and the invasion of employee rights" in order to determine whether the employer's conduct is so destructive of said employee rights as to mandate finding a violation of Section 8(a)(1) and (3) of the Act. NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967); Capehorn Industry, 336 NLRB 364, 365 (2001). On the other hand, according to the Court, in cases alleging other acts of alleged unlawful discrimination, if the impact, upon employees' statutory rights, of an employer's discriminatory conduct is found to be ". . . comparatively slight, an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justification for the conduct." Great Dane Trailers, supra at 34. Once the employer establishes such legitimate and substantial business justification for its actions, its conduct is "prima facie lawful," and no violation of the Act may be found unless the General Counsel makes an "affirmative showing of unlawful motivation." Id.

While not specifically deciding the issues posed herein, the Supreme Court, federal courts of appeals, and the Board have decided numerous cases, involving employer lockouts of bargaining unit employees and related issues, and have utilized the above analytical framework in examining the impact of such conduct upon employees' statutory rights and whether such conduct was violative of Section 8(a)(1) and (3) of the Act. Thus, the Supreme Court has held that, following impasse, the impact, upon employees' Section 7 rights, of an employer's lockout of its bargaining unit employees for the sole purpose of exerting economic pressure in support of a legitimate bargaining position is comparatively slight rather than inherently destructive and, absent unlawful motivation, does not violate Section 8(a)(1) and (3) of the Act. American Ship Building, supra. Further, the Court has found that nonstruck employers in a multiemployer bargaining association do not engage in inherently destructive conduct and do not violate Section 8(a)(1) and (3) of the Act by continuing operations with temporary replacements after lawfully locking out bargaining unit employees in response to a whipsaw strike against one association member.[25] NLRB v. Brown Food Stores, 380 U.S. 278 (1965). Similarly, the Court of Appeals for the D.C. Circuit determined that an employer acted lawfully when it imposed a lockout to force its bargaining unit employees to cease employing a so-called "inside game weapon" during a contract dispute. The court decided that, rather than being inherently destructive of its employees' Section 7 rights, the lockout, which was an economic response to the employees' strategy, had a comparatively slight impact upon said rights and was undertaken to support the employer's bargaining strategy. Local 702, Electrical Workers IBEW v. NLRB, 215 F.3d 11 (D.C. Cir. 2000). Likewise, in Harter Equipment, 280 NLRB 597 (1986)(Harter 1), affd. sub nom. Operating Engineers Local 825 v. NLRB, 829 F.2d 458 (3rd Cir. 1987), rationalizing that the employer's use of temporary replacements in order to engage in business operations during an otherwise lawful lockout had only a comparatively slight impact upon its employees' statutory rights, the Board held that, absent evidence of unlawful animus, a single

[24] Such "inherently destructive" conduct is of a type, which has "unavoidable consequences which the employer not only foresaw but which he must have intended." NLRB v. Erie Resistor, 373 NLRB 221, 228 (1963).

[25] Assessing the impact upon employees' Section 7 rights, the Court concluded that the use of temporary replacements added only slightly to the impact of the lawful lockout upon the employees' Section 7 rights. Brown Food Stores, supra, at 288.

employer, such as Respondent, does not engage in conduct violative of the Act by engaging in such a tactic. Also, in International Paper Co., 319 NLRB 1253 (1995), the Board held that an employer engaged in conduct, "inherently destructive of employee rights" and violative of Section 8(a)(1) and (3) of the Act, by permanently subcontracting bargaining unit work during a lawful lockout of its employees; and, in Ancor Concepts, Inc., 223 NLRB 742, 744 (1997) rev'd on other grounds 166 F.3rd 55 (2nd Cir. 1999), which involved a strike, the hiring of replacements, and a subsequent lockout of the striking employees, the Board ruled that, after declaring its replacements were permanent employees, an employer's failure to reinstate striking employees upon their unconditional offer to return to work was ". . . inherently destructive of employee rights . . . and violates Section 8(a)(3) and (1)" of the Act.[26]

I believe that, in determining whether Respondent engaged in acts and conduct, violative of Section 8(a)(1) and (3) of the Act, by failing and refusing to immediately reinstate 24 former locked-out employees upon the acceptance, by each, of its offer of reinstatement at the conclusion of its 14 year lockout and by failing and refusing to treat the seven returning former locked-out employees the same as regular full-time employees for purposes of the assignment

---

[26] In her post-hearing brief, counsel for the General Counsel correctly argues that "locked-out employees may not be permanently replaced" and that ". . . once a lockout ends, they are entitled to immediate reinstatement." Then, while recognizing the existence of no exact case precedent for the precise issues involved herein, contrary to counsel for Respondent, she contends that locked-out employees' rights to immediate reinstatement in place of temporary replacements and to treatment as regular full-time employees after returning to work are akin to those of economic strikers who have been temporarily replaced. While conceptually counsel's arguments have merit, I do not agree with her in regard to these matters. Thus, it is true that the essential fact of a lawful lockout is the locking out all the bargaining unit employees, with those hired into unit jobs during the lockout necessarily being temporary replacements for the locked-out bargaining unit and not eligible to vote in a representation election. Harter Equipment, 296 NLRB 647, 648 (1989)(Harter 2). However, notwithstanding the apparent clear Board law, with the approval of the Regional Director of Region 32, the parties entered into a stipulated election agreement, which effectively placed Respondent's replacement employees and the locked-out employees on an equal footing in the bargaining unit. In these circumstances, given the agreement of the parties, I am not sufficiently sanguine regarding the status of Respondent's replacement employees to justify reliance upon those Board decisions, concerning the rights of strikers to immediate reinstatement to jobs occupied by temporary replacements, as precedent for my legal conclusions on the matters at issue herein. Nevertheless, in NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967), a case involving the right of employees to immediate reinstatement to their jobs, which remained unfilled during the strike, upon their unconditional offer to return to work at the conclusion of an economic strike, the Supreme Court stated that Section 2(3) of the Act provides, in part, that the term "employee . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment." As the administrative law judge in International Paper Co., supra, at 1352, noted, "The same language in Section 2(3) preserves the continued employee status (and, therefore, the statutory rights concomitant to that status) of individuals whose work has ceased because their employer has lawfully locked them out in an effort to induce their bargaining representative to accept his contractual proposals." In these circumstances, I believe Board decisions, involving the asserted right of strikers to be reinstated to jobs which are not filled by temporary replacements, may be utilized as precedent for deciding the right to immediate reinstatement issue herein.

of overtime, I am required to assess the impact of said acts on three statutory rights—the right to bargain collectively, the right to strike, and the right to engage in union activities. Harter 1, supra, at 597. With regard to Respondent's failure to immediately reinstate each of the 24 locked-out employees, who accepted its December 19, 2003 offer of reinstatement, at the outset, I note that, inasmuch as such was instituted to induce the Union to enter into a new collective-bargaining agreement presumably upon terms favorable to it, Respondent's November 1989 lockout of its bargaining unit employees and its hiring of temporary replacements appear to have been typical of such employer actions, which the Supreme Court, lower federal courts of appeals, and the Board have found lawful. Further, in my view, notwithstanding that the lockout did not culminate with a new contract but, rather, with the replacement employees and the locked-out employees voting against representation by either the Union or the Teamsters, Respondent had been obligated to offer reinstatement just as if the Union had agreed to enter into a new collective-bargaining agreement, and Respondent's agreement to offer reinstatement to the locked-out employees should be viewed as necessary rather than beneficent. Put another way, as to the bargaining unit employees' right to immediate reinstatement, I think the vote of the employees against representation was tantamount to a bargaining unit's acceptance of a new collective-bargaining agreement and, if Respondent had refused to offer reinstatement to the locked-out employees, such would have unlawfully converted the status of the replacement workers to that of permanent employees. Ancor Concepts, supra.

During the 14 years since 1989, in adamantly adhering to the Union's bargaining position while Respondent perpetuated its lockout of them, the bargaining unit employees had collectively exercised their Section 7 rights to assist the Union and to bargain collectively through the Union as their bargaining representative. In these circumstances, one may persuasively contend that, by delaying reinstatement to the 24 locked-out employees even for a relatively short period of no more than 60 days, Respondent conveyed to the above individuals and to its replacement workers a message of retaliation against its employees' exercising of said rights even after the bargaining unit employees, by voting against representation by the Union or the Teamsters, had signified a desire to cease engaging in said activities. Moreover, Respondent's act of delaying reinstatement of the locked-out employees, to some extent, arguably served to chill the future exercise of the above statutory rights by the returning bargaining unit employees and by the replacement employees. Further, Respondent's locked out employees signaled their desire to return to work by voting against union representation and, while not arising to permanent loss of jobs, Respondent's failure to immediately reinstate those locked-out employees, who accepted its offer, subjected them to continued loss of wages. Finally, the Board has found an employer's delayed, rather than immediate, reinstatement of strikers, who unconditionally offered to end their strike and return to work, to jobs, which remained unoccupied during their strike, to be violative of Section 8(a)(1) and (3) of the Act. Westpac Electric, 323 NLRB 1322, 1364 (1996). Notwithstanding the foregoing, the record herein is devoid of any actual evidence, regarding the adverse effect, if any, of Respondent's failure to immediately reinstate each of the 24 locked-out employees upon the above-stated statutory rights of its employees. Therefore, in the context of its payment of weekly per diem payments and travel expenses to the 24 locked-out employees and, after 14 years, the relatively short period of delay in reinstating them, I agree with counsel for the General Counsel that Respondent's actions were not "inherently destructive" of its employees' statutory rights and, at most, had had a "comparatively slight" impact on them.

In these circumstances, the burden shifted to Respondent to establish that it had "legitimate and substantial business justification" for denying immediate reinstatement to each of the locked-out employees, who accepted Respondent's offer, upon receipt of said acceptance. In this regard, Respondent apparently bifurcates its defense into two separate time periods-- the

30-day time period, ending on January 22, 2004, which the locked-out employees were afforded in order to accept Respondent's reinstatement offer, and the time period from January 23 through February 23, 2004. With regard to the former time period, Respondent's defense concentrates upon its expectations as of December 19, the date of its offers, and emphasizes two points— that, not until January 22, would it possess specific knowledge as to the exact number of locked-out employees who would accept its reinstatement offer and that reinstating said individuals on a piecemeal basis would be administratively inefficient and a disruptive business practice.[27] As to the first point, Dave Davis asserted that Respondent expected a "relatively high" rate of acceptances and that, in such circumstances, not only would there be an insufficient number of jobs for all employees but also, if Respondent commenced immediately reinstating those who accepted its offer, by necessity, it would be faced with the burdensome task of reassessing seniority and job bumping rights on a daily basis. However, while, perhaps, an unexpectedly large number of the locked-out unit employees voted in the election, the Board has held, in the context of a strike, that, after an unconditional offer to return, a failure to be able to predict, with certainty, the number of strikers, who would accept reinstatement to unfilled jobs, does not relieve an employer of the obligation to reinstate those, who desire to return to work, in a timely manner. Coca Cola Bottling Works, 186 NLRB 1050, 1051 (1970). Moreover, Respondent was aware that several locked-out employees had left California or were either dead or disabled and that, prior to the representation election, a Union official had informed Danny Urbano, the manager of labor relations, he thought "less than 30, around 30" of the locked-out employees would accept reinstatement. Further, while, on December 19, 2003, Respondent's facility was operating at full capacity, with approximately 90 replacement employees, and, If all or close to all of the locked-out employees accepted Respondent's offer and sought immediate reinstatement, the availability of jobs may have been a problem, the fact, which Respondent does not dispute, is that most, if not all, of the 24 individuals, who did accept its offer, had sufficient seniority for immediate reinstatement by bumping into jobs currently held by replacements. In any event, according to Davis, Respondent had no plans to lay off any employees even if all 24 locked-out employees returned to work in February. As to Respondent's contention, that reinstating returning locked-out employees on a piecemeal, rather than group, basis would have been an inefficient and disruptive business practice, Davis conceded that Respondent could have given each of the above 24 individuals individual training. Moreover, he admitted that new hires are trained on an individual basis when necessary. Also, while it locked out its bargaining unit employees in response to their strike, notwithstanding the employees' unconditional offer to end the strike and return to work, Respondent acted on its own volition to continue the lockout until the Union capitulated on a new contract, presumably on terms favorable to the former, and must bear the consequences of said act. Therefore, that Respondent may have perceived administrative problems regarding immediately reinstating its locked-out employees is, in my view, irrelevant to its duty to reinstate. In these circumstances, I do not believe that Respondent's lack of knowledge as to the exact number of locked-out employees who would accept its offer of reinstatement or its administrative and efficiency concerns constitute legitimate and substantial justifications for its

---

[27] While Dave Davis raised the language of the parties' August 19, 2003 side letter as a justification for delaying reinstatement and while he presumably was raising the matter of waiver, such was not mentioned as an affirmative defense by Respondent in its answer to the complaint in Case 32-CA-21181, and counsel for Respondent, who undoubtedly was aware of and formulated all of Respondent's defenses, never mentioned the putative issue in his post-hearing brief. In these circumstances, while agreeing with counsel for the General Counsel's and counsel for the Charging Party's analysis of the issue, I will assume waiver is not a component of Respondent's defense and not discuss it.

alleged discriminatory actions. Accordingly, even absent evidence of unlawful animus, I find that, during the time period December 19, 2003 through January 22, 2004, by failing to immediately reinstate each of the 24 locked-out employees upon receipt of his and her acceptance of its offer of reinstatement, Respondent engaged in discriminatory acts and conduct, which impacted upon its employees' statutory rights in violation of Section 8(a)(1) and (3) of the Act.[28]

Turning to Respondent's alleged unlawful discriminatory treatment of the seven[29] returning locked-out employees as new employees for the purposes of overtime assignments after their reinstatement on February 23, the parties stipulated that, inasmuch as it had no specific information about what work the seven returning locked-out employees performed during the 14 years of the lockout, whether the returning employees had the physical skills and abilities to perform their required job duties, and whether they would have any difficulties learning the new systems and methods, utilized by it, and as it believed that the returning locked-out employees would need a training period to be able to perform all aspects of their jobs efficiently and quickly as the existing employees, Respondent placed the returning locked-out

---

[28] Further, assuming arguendo Respondent had legitimate business reasons for delaying until January 22, I believe that it failed to justify its additional delay, from January 23 until February 23, 2004, in reinstating the above 24 locked-out employees. In this regard, I note, initially, that, as stated above, the Board countenances almost no delay in striker reinstatement cases and that Respondent failed to explain why a letter, similar to its January 28 letter, could not have been mailed to each locked-out employee, who accepted Respondent's reinstatement offer, immediately upon receipt of said acceptance in December, why each of said individuals could not have been reinstated as soon as January 26, the first Monday after the January 22 deadline, or why, after the January 22 deadline, Respondent inexplicably delayed until January 28 to send its letter, outlining reinstatement procedures, to the locked-out employees, who had accepted its offer. In any event, ignoring January 26, Respondent asserts that it wanted to have the entire group begin working on a Monday, which day is the start of a pay period, but that Monday, February 2 was ruled out as it was too close to January 28, thereby affording the employees, who were coming from outside Arizona, little time to report after receipt of the January 28 letter. The next two Mondays (February 9 and 16) were considered and rejected as reporting dates, for such would have left no time for the employees to give their current employers the standard two-weeks notice, and, specifically with regard to February 16, plant manager Chappell, who was to be central in retraining the returning employees and who was the only existing manager with knowledge of the bargaining unit employees' skill levels, was scheduled for vacation. As to February 9, other than uncorroborated hearsay, there is no evidentiary support for Davis' assumptions regarding the need for any locked-out bargaining unit employee to give his current employer two weeks notice before quitting or regarding requests for additional moving time. In any event, even crediting the basis for Davis' decision regarding February 9, said rejection apparently was based upon the comments of merely two of the 24 locked-out employees. Concerning the necessity of plant manager Chappell's presence for training, the record evidence is that he was available for training during the entire month of January, and during the weeks of February 2 and 9, 2004. Moreover, Davis admitted that other managers could have performed the training for the returning locked-out employees, and, in fact, the record evidence is that other managers performed some of the training on February 23. In these circumstances, Respondent failed to establish a "legitimate and substantial business justification" for delaying reinstatement after, at the latest, January 26, 2004.

[29] Of course, Charles Collenback, a returning locked-out employee, also reported for work on February 23. I shall further discuss his status in the Remedy section of this decision.

employees on four-week training periods just as if they were new employees. Specifically as to Respondent's limiting overtime assignments for said employees, citing to cases involving discriminatory treatment of returning economic strikers, with regard to seniority, job assignments, layoff rights, and benefits, such as Oregon Steel Mills, 291 NLRB 185 (1988); Wisconsin Packing Co., 231 NLRB 546 (1977), and Transport Co. of Texas, 177 NLRB 180 (1969), Counsel for the General Counsel contends that, upon their reinstatement, returning locked-out employees ". . . [should have been] treated uniformly with non-locked-out employees with respect to whatever benefits accrue[d] to the latter from the existence of the employment relationship" and that, therefore, Respondent violated Section 8(a)(1) and (3) of the Act by treating the seven returning locked-out employees as new employees for purposes of assigning overtime. The parties stipulated that, prior to the lockout, each of the seven returning locked-out employees had acquired the same overtime privileges as other full-time bargaining unit employees. Thereafter, even for the short four-week time period after reinstatement, by treating each as a new employee for purposes of overtime assignments, Respondent placed each returning locked-out employee in a position subordinate to every existing full-time employee, thereby denying him the full and complete reinstatement to which he was entitled. In such circumstances, I believe, Respondent's conduct was seen, by the seven alleged discriminatees, as nothing less than retaliation for their support for the bargaining unit employees' strike and their Union's bargaining position and, by the existing employee complement, as a warning of the consequences of their support for a union. I further believe that, notwithstanding the relatively short period of the limited overtime assignments herein, the adverse effect of Respondent's actions upon its employees' aforementioned statutory rights to engage in support for a labor organization and to bargain collectively may not be characterized as "slight." Rather, and contrary to counsel for Respondent, given the language of Section 2(3) of the Act, I can see no difference between Respondent's treatment of its returning locked-out employees and the employers' inherently discriminatory treatment of returning economic strikers in the above-cited Board decisions. Bluntly put, Respondent treated its seven returning locked-out employees as if they were recent hires and deprived them of the status they would have retained but for the bargaining unit's strike and its subsequent 14-year lockout of said employees. Therefore, counsel for the General Counsel's citations to Board decisions, involving discriminatory actions against returning strikers, constitute binding legal precedent and, in accord with such decisions, I view Respondent's discriminatory treatment of its the returning locked-out employees as inherently destructive of its employees' statutory rights. Transport Co. of Texas, supra at 187; Oregon Steel Mills, supra; Wisconsin Packing Co., supra.

As stated above, the Supreme Court directs that the Board balance a respondent's actions with its claimed business justification in order to determine if such may be found violative of Section 8(a)(1) and (3) of the Act. In this regard, I note that, in his post-hearing brief, counsel for Respondent argues that the "primary" reason Respondent failed to provide equal overtime opportunities for the seven returning locked-out employees, during their first four weeks back at work, was that "overtime work involves higher pay." Thus, counsel asserts, given that it did not know whether these employees continued to possess the physical skills and abilities necessary for their jobs and that, assuming they did have the requisite skills and ability, it believed they required the short four-week time period to "get up to speed" so they could perform their job tasks as quickly and efficiently as its existing employees, who do receive premium pay for overtime work, Respondent had a legitimate business reason for temporarily limiting the overtime opportunities for returning locked-out employees. On this point, counsel notes the differences between work at Respondent's Yuma facility in 1989 and work there in 2004, including the necessity today for employees to know how to use the computerized scanners and the exact dates and locations of product within the cooler facility in order to maximize their freshness, especially mixed salads, which product did not exist in 1989, and argues that these changes in operations were something the returning locked-out employees

were required to learn in order to perform their job tasks proficiently. While Respondent may have assumed that the returning strikers were in need of training on February 23, in the absence of underlying data, such was unadorned speculation, and the stipulated facts are that, within five days of their return, the seven employees were working independently and, while each did need to learn the location of product in the cooler, product codes, and product dating requirements, not all utilized the hand-held scanners to perform their job duties, neither Jackson, Lopez, Penny, Rodriguez, nor Tully needed training on the mechanical operation of a forklift or the mechanics of loading and unloading product and all were operating forklifts the day after their return to work, and other employees and foremen were available to answer questions, if any. Moreover, Respondent failed to document the progress, work performance, or any limitations of the job performance of the seven employees during the four weeks after February 23. Further, in a decision involving the analogous aftermath of a strike, the Board held that " it is not until the returning striker demonstrates an inability to do the work that the employer may take steps to assure itself that the incumbent needs some sort of special scrutiny." Alaska Pulp Corp., 326 NLRB 522, 562 (1998). In the above circumstances, Respondent's asserted business justifications are insignificant and without merit when compared to the discriminatory nature of its treatment of the returning locked-out employees. Accordingly, I find that, by treating said individuals as new employees for purposes of assigning overtime for a four-week period after their return to work on February 23, 2004, Respondent engaged in conduct inherently discriminatory of employees' rights in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is, and has been at all times material herein, an employer engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is, and has been at all times material herein, an employer engaged in commerce or in an industry affecting commerce within the meaning of Section 2(5) of the Act.

3. By failing and refusing to immediately reinstate the 24 locked-out employees, who accepted its December 19 offer of reinstatement at the conclusion of its lockout, upon receipt of the acceptance from each, Respondent discriminated against its employees, who exercised their statutory rights, in violation of Section 8(a)(1) and (3) of the Act.

4. By treating returning locked-out employees as new employees for the purposes of assigning overtime during the initial four weeks of their reinstatement, Respondent discriminated against its employees, who exercised their statutory rights, in violation of Section 8(a)(1) and (3) of the Act.

5. The aforementioned unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

I have found that Respondent engaged in serious unfair labor practices, directly impinging upon employees' statutory rights, within the meaning of Section 8(a)(1) and (3) of the Act. In order to remedy these, I shall recommend that it be ordered to cease and desist from engaging in said acts and conduct and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. I have found that Respondent discriminatorily failed and refused to immediately reinstate the 24 locked-out employees, who accepted its December 19 offer of reinstatement, upon receipt of said offers from each of them. Accordingly, I shall

recommend that Respondent be ordered to make employees John Rodriguez, Charles Collenback, Ray Velasquez, Danny Gutierrez, Alvin Anderson, John Todd, Rod Kenneth Penny, Matt Forstedt, Cheryl Vaz, Robert Tully, Jerry McBride, Loretta Heinz, Alejandro Rivas, Rigoberto Lopez, Eugene Navavoli, Salvatore Escobar, Gary Jackson, Thomas Norris, Joe Flores Olvera, Louie Pestoni, Michael Kemp, Russ Christiansen, Larry Joe Azlin, and Mel Southworth whole for any wages and other benefits lost from the date on which Respondent received the acceptance from each of its offer of reinstatement until February 23, 2004, the date which Respondent established for reinstatement, with interest to be computed in accord with the Board's holding in New Horizons for the Retarded, 283 NLRB 1173 (1987).[30] Also, I have found that Respondent discriminated against returning locked-out employees Gutierrez, Jackson, Lopez, Penny, Rivas, Rodriguez, and Tully, all of whom reported for work on February 23, 2004, by treating each as a new employee for purposes of the assignment of overtime work. Accordingly, I shall recommend that Respondent be ordered to make each of said employees whole for any overtime payments, to which he would have been entitled but for Respondent's discrimination against him, with interest to be computed in accord with the Board's decision in New Horizons for the Retarded, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

The Respondent, Bud Antle, Inc., its officers, agents, successors, and assigns, shall:

---

[30] I have carefully considered whether any of the 15 individuals, who failed to report for work on February 23, 2004 should receive any backpay. In this regard, it may be argued that, by failing to report, they abandoned their right to backpay or that they never had any intention of returning to work for Respondent. However, by accepting Respondent's offer, each of the 15 clearly signified his or her desire to return to work for Respondent. Moreover, one may reasonably argue that Respondent's unlawful delay in reinstating each caused him or her to decide not to return. Traditionally, the Board concludes that any ambiguity be resolved in favor of the aggrieved party. Accordingly, I have fashioned a make whole remedy for each of the 15 locked-out employees, who accepted Respondent's offer but did not report for work on February 23. Mercy-Memorial Hospital Corp., 231 NLRB 1108, 1116 (1977). Of course, if Respondent possesses any evidence, or is otherwise able to establish, that any of the 15 individuals, who failed to report for work on February 23, actually had no desire of accepting Respondent's offer, it may offer said evidence at the compliance stage. With regard to employees Gutierrez and Azlin, counsel for Respondent acknowledged that Davis' testimony was, of course, uncorroborated hearsay. He did not offer it for the truth, and I have given it no weight. Accordingly, each is entitled to the full backpay remedy; however, during the compliance stage, Respondent is entitled to establish that any backpay for either should be limited with direct evidence regarding his ability to report for work on the scheduled date. Finally, in accord with counsel for the General Counsel, backpay for employee Collenback is limited to the period from Respondent's receipt of his acceptance of the former's offer until the date of his work-related injury while employed elsewhere.

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Failing and refusing to immediately reinstate its locked-out bargaining unit employees who accepted its offer of reinstatement, upon receipt of their acceptances of its offer;

(b) Treating returning locked-out bargaining unit employees as new employees for purposes of assigning overtime;

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employees John C. Rodriguez, Charles Collenback, Ray Velasquez, Danny Gutierrez, Alvin Anderson, John Todd, Rod Kenneth Penny, Matt Forstedt, Cheryl Vaz, Robert D. Tully, Jerry McBride, Loretta Heinz, Alejandro Rivas, Rigoberto Lopez, Eugene Navavoli, Salvatore Escobar, Gary E. Jackson, Thomas O. Norris, Joe Flores Olvera, Louie Pestoni, Michael Kemp, Russ Christiansen, Larry Joe Azlin, and Mel Southworth whole for any loss of earnings and other benefits suffered as a result of Respondent's failure to immediately reinstate them after the end of its lockout of them, in the manner set forth in the remedy section of the decision;

(b) Make employees Gutierrez, Lopez, Jackson, Penny, Rivas, Rodriguez, and Tully whole for any loss of overtime earnings as a result of its discriminatory treatment of them as new employees for purposes of assigning overtime in the manner set forth in the remedy section of the decision;

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order;

(d) Within 14 days after service by the Region, post at its coolers located in Yuma, Arizona and Marina and Huron, California copies of the attached notice, marked "Appendix."[32] Copies of the notice, in Spanish and English, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice

[32] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

to all current employees and former employees employed by the Respondent at any time since December 19, 2003;

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: February 17, 2005

_____
Burton Litvack
Administrative Law Judge

JD(SF)-15-05
Salinas, CA

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to immediately reinstate our employees, whom we locked out in 1989 and who accepted our offer of reinstatement after the lockout, upon receipt of their acceptances of our offer.

WE WILL NOT treat our employees, who returned to work after our lockout of them, as new employees for purposes of assigning overtime to them during the first four weeks after their reinstatement.

WE WILL make employees John C. Rodriguez, Charles Collenback, Ray Velasquez, Danny Gutierrez, Alvin Anderson, John Todd, Rod Kenneth Penny, Matt Forstedt, Cheryl Vaz, Robert D. Tully, Jerry McBride, Loretta Heinz, Alejandro Rivas, Rigoberto Lopez, Eugene Navavoli, Salvatore Escobar, Gary E. Jackson, Thomas O. Norris, Joe Flores, Olvera, Louie Pestoni, Michael Kemp, Russ Christiansen, Larry Joe Azlin, and Mel Southworth whole for any wages and other benefits lost as a result of our failure to immediately reinstate each of them after each notified us, accepting our offer of reinstatement at the end of our lockout of them, with interest.

WE WILL make employees Gutierrez, Lopez, Jackson, Penny, Rivas, Rodriguez, and Tully whole for any loss of overtime earnings as a result our discriminatory treatment of them as new employees for the purposes of assigning overtime during the first four weeks after their reinstatement.

BUD ANTLE, INC.
Employer

Dated: _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

JD(SF)-15-05
Salinas, CA

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER AT (510) 637-3270.